UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

VERITAS HEALTH SERVICES, INC. d/b/a CHINO VALLEY MEDICAL CENTER, Respondent, and UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO, Charging Party.	Case No.: 31-CA-107321

CHARGING PARTY'S POST-HEARING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

NLRB

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

FEDERAL

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes

I. INTRODUCTION

Charging party United Nurses Associations of California/Union of Health Care Professionals ("UNAC" or "Union") filed an unfair labor practice charge against respondent Veritas Health Services d/b/a Chino Valley Medical Center ("Respondent," "Chino," or "Employer") for unlawfully withdrawing recognition in violation of the National Labor Relations Act ("NLRA"). This is just the most recent in a long series of charges filed since the Union soundly won the April 2010 election conducted by the National Labor Relations Board ("NLRB" or "Board"). Counsel for the General Counsel proved all allegations of its complaint as amended ("Complaint") at the November 18, 2014 hearing before Administrative Law Judge ("ALJ") John McCarrick. The Union joins in the Counsel for the General Counsel's request that all relief requested in its Complaint be granted. UNAC writes separately to emphasize that Chino clearly violated the NLRA when it withdrew recognition during the certification year and before it remedied its earlier widespread and egregious unfair labor practices. UNAC also notes the record supports that it did not inexcusably procrastinate negotiations' commencement. UNAC further writes to emphasize that the NLRA's purposes are best effectuated by a remedial order that includes awarding: UNAC its bargaining costs; litigation expenses for this proceeding; an extension of the certification year; and a notice reading.

II. FACTUAL BACKGROUND

A. Chino has a long history of NLRA violations against UNAC.

After UNAC won the 2010 NLRB-conducted election, Chino committed a series of unfair labor practices to undermine employee support of the union and to delay negotiations. The parties' litigation history began years earlier. In 2009, ALJ Lana Parke set aside a 2008

NLRB-conducted election that the Union lost, finding Chino committed objectionable conduct affecting the outcome of the election. *See* JX 1 n.2. The case lingered at the NLRB until the Union withdrew its objections. *Id*.

In 2010, UNAC filed a new petition for an RN unit at Chino, and soundly won an NLRB-conducted election on April 1-2, 2010. *Id*. at 2:2-5. There were 72 votes for the Union, 39 votes against, 4 challenged ballots, and 1 void ballot. *Id*. After the election, the Employer filed 29 election objections, alleging supervisory prounion conduct, union vandalism and threats of violence, and union manipulation and unauthorized use of employee photographs. A four-day hearing was held before Judge Parke on May 25-27 and June 7, 2010. In the Employer's post-hearing brief, the Employer withdrew a number of objections regarding prounion supervisory conduct and all objections regarding union vandalism and threats of violence. *Id*. at 2:11-13. On July 7, the ALJ issued her Report and Recommendations on Objections, recommending that "the Employer's objections, in their entirely, be overruled." *Id*. at 14:19-20. The Employer filed Exceptions to the ALJ's Report. The NLRB adopted the ALJ's report and recommendation, and certified UNAC as the exclusive representative of the Chino's RNs on January 25, 2011. JX 2.

The day following certification, UNAC requested to begin bargaining, but the Employer refused based on its already-rejected supervisory prounion misconduct claims. *See* JX 3, p. 2. The day following the Employer's communication of its refusal, UNAC filed an unfair labor practice charge with the NLRB based on the refusal to bargain with the RNs' certified representative. *Id*. at pp.1-2. A complaint was issued, and the Employer admitted to the material facts as alleged therein. A summary judgment motion was then brought before the NLRB and granted. *Id*. Chino petitioned for review, and the NLRB filed a cross-application for enforcement with the D.C. Circuit. On March 13, 2012, the Court denied Chino's petition and

granted the NLRB's cross-application for enforcement because the NLRB did not abuse its discretion and its factual findings were supported by substantial evidence. *See* JX 4 (*Veritas Health Servs. Inc. v. NLRB*, 671 F.3d 1267 (D.C. Cir. 2012)).

No bargaining occurred during this two-year gap between the election and the Court's enforcement order. Instead, Chino committed many unfair labor practices in violation of the NLRA. Specifically, Chino violated Sections 8(a)(1), (3), and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1), 158(a)(3), and 158(a)(5), by *inter alia* threatening employees with loss of employment, termination, and other adverse consequences if they supported a union, interrogating an employee about union activities, discharging an employee Ronald Magsino because he supported UNAC/UHCP, beginning to enforce previously-unenforced rules, unilaterally changing employee benefits, and refusing to provide UNAC/UHCP with requested and relevant information for collective bargaining. Counsel for the Acting General Counsel proved nearly all allegations of its consolidated complaint at a six-day hearing, in June 2011, before Judge William Kocol, in Case Nos. 31-CA-29713, *et al*., and on October 17, 2011, ALJ Kocol found Employer indeed engaged in egregious and widespread misconduct. *See* JX 5, pp. 5-25. The parties filed exceptions, and the Board largely adopted the Judge's decision, reported at 359 NLRB No. 111, dated April 30, 2013, finding the Employer had violated NLRA Sections 8(a)(1), (3), and (5). *Id*. at pp.1-5. In its decision, the NLRB ordered the Chino, *inter alia*, to cease and desist from threatening employees with adverse consequences for supporting a union, coercively interrogating employees, discharging or otherwise discriminating against employees for supporting a union, enforcing previously-unenforced rules, unilaterally changing benefits, and refusing to provide UNAC/UHCP with requested and relevant information for collective bargaining. *Id*. at pp. 2-3. Employer petitioned for review in D.C. Circuit, Case No. 13-1163.

JX 6. The petition was held in abeyance pending the U.S. Supreme Court's decision in *Noel Canning v. NLRB*. JX 7. The matter has returned to the Board for review in light of the Court's *Noel Canning* Decision. JXS 60-61.

After bargaining commenced, Chino continued to violate the Act by refusing to provide information and making unilateral changes during bargaining. For example, in Case No. 31-CA-091701, the NLRB served a complaint and notice of hearing over these matters. JX 8. Chino signed a settlement agreement to remedy one of the violations: Chino's unilateral implementation of a new break-relief position when the parties had been actively bargaining over the issue. The settlement was signed in May 2013 with a notice posting requirement beginning on June 28, 2013. JX 9.

B. After four years of legal challenges, UNAC worked expeditiously to prepare for bargaining once the D.C. Circuit's ruling issued.

The Union did not know when the D.C. Circuit would issue its ruling after the matter was submitted at the close of oral arguments on December 1, 2011. JX 4, p.3. As soon as the D.C. Circuit issued its bargaining order on March 13, 2012, UNAC began its negotiation preparation. Tr. 49:18-50:2; 60:24-61:2. On March 20, 2012, UNAC demanded to bargain with Chino, and requested information for bargaining. JX 10. At the same time, UNAC had to reconnect with the Registered Nurses because since the April 2010 election, there had been tremendous turnover of RNs in the bargaining unit. Tr. 50:10-16. Comparing the April 2010 Excelsior list to the Employer's RN list produced in Spring 2012, the Union calculated that at least 47-49% of the RNs were new, meaning they had not been employed when the 2010 Union election occurred. Tr. 69:8-19. Reaching out to the RNs was a difficult process because the Union did not have access to the facility so instead it had to wait for Chino to respond with the RNs' names and

home addresses, and then it could contact the RNs by mail [CP 2] and try to visit each nurse at his or her home or reach them by phone. Tr. 50:3-10.

In addition to the Information Request sent to Chino, UNAC also reached out to other unions that have collective-bargaining agreements ("CBAs") with Chino's owner Prime Healthcare "to review what had already been agreed to in other Prime contracts." Tr. 52:7-11; JX 10. Collecting these other CBAs took two to three weeks. Tr. 53:1-2.

Once the Union received its requested information about the bargaining unit, it began analyzing Chino's departmental units and the number of RNs in each unit to determine the "appropriate constitution for the [Union's] bargaining team," before opening up nominations for the team positions and holding an election. Tr. 53:10-16. For the nomination process, the Union held off-site meetings where it explained the process and distributed nomination forms to be taken back to Chino for RNs to nominate their coworkers. Tr. 53:24-54:4. Once there was a nominations list, an election occurred. Tr. 54:5-7.

UNAC also had to develop a bargaining survey specific to Chino RNs. Tr. 60:9-12. It was in writing and distributed to all Chino RNs. Tr. 59:10-19. The surveys were collected over a two to three week period ending May 4, then staff entered all the information, and finally someone calculated rankings for each survey items for a priorities summary. Tr. 59:10-23; CP 1; CP 3. A general membership meeting was held on May 23. CP 3.

UNAC had to build a Contract Action Team to be able to help the Union communicate with RNs in the facility as developments in negotiations occurred, and to encourage the RNs to attend the negotiations. CP 3.

UNAC had to then train its elected bargaining team about the collective-bargaining process over the course of several meetings. Tr. 57:3-9. Because this was the first contract

between UNAC and Chino, UNAC had to draft all proposals from scratch based on Prime's other CBAs, UNAC's other CBAs; practices at Chino, and the bargaining unit's priorities based on the bargaining survey results. Tr. 56:15-25; CP1. This review includes analyzing all Employer medical plans, reviewing Chino's employee handbook, learning Chino's pay practices, including shift differences or specialty differentials, leaves of absence policies, and comparing California nurse license records to Chino's records to verify that Chino had correctly captured the length of a nurses' licensure. Tr. 111:20-112:9. UNAC prepared spreadsheets comparing the health benefits and RN wage rates at Chino to other hospitals in the area and other hospitals owned by Prime Healthcare. Tr. 114:1-15.

UNAC also needed to work with the Employer to determine a bargaining location, get their bargaining team members released from work, and establish bargaining dates with the Employer. The parties agreed to the first bargaining dates on April 26. Tr. 65:11; JXS 12-13. Union and Employer began bargaining on June 13, 2012. JX 62 at Stipulated Fact No.8.

C. Parties bargained all material terms of a collective-bargaining agreement save an effective date when Chino unlawfully withdrew recognition in June 2013.

The parties met for 25-27 sessions until May 24, 2013. *Id*. As of May 25, 2013, the parties had reached agreement on all outstanding terms with four exceptions: (1) Employer had an outstanding proposal on Compensation (Article 13) [JX 47]; (2) Employer had an outstanding proposal on 401k (Article 28); (3) Employer had an outstanding proposal entitled "Full Negotiations, Complete Agreement and Waiver (New Article); and Union had an outstanding proposal for a Most Favored Nation clause (Article 30). *Id*. at Stipulated Facts Nos. 9-11. After the May 24, 2013 bargaining session, the next bargaining session was later scheduled for July 2, 2013. *Id*. at Stipulated Fact No. 13; JX 48.

On June 10, 2013, UNAC's Chief Negotiator Barbara Lewis (Director of Collective Bargaining and Representation) informed Chino in writing that it was withdrawing its lone remaining proposal and accepting the Employer's three remaining proposals without alteration; this decision was sent to the Employer's Chief Negotiator Mary Schottmiller by letter dated June 10, 2013 and delivered by courier at 3:41 p.m. JXS 51-52; JX 62 at Stipulated Fact No. 14. In the letter, Barbara requested that Mary "sign the attached TA's and send back one copy of each article to me for my records" JX 51, p. 2. Schottmiller responded later that day (by letter dated the previous day): "Please be advised that Chino Valley Medical Center received objective evidence on June 9, 2013 that a majority of employees in the certified/recognized unit no longer wish to be represented by your union. Accordingly, Chino will not continue negotiations with your union for a collective bargaining agreement." JX 53; JX 62 Stipulated Fact No. 15. The parties agreed to a three-year agreement as was reflected in wage proposals, which covered just three years. Tr. 115:17-25. Chino had floated the idea of a four-year term, but the Union responded that it would not work because the Union needed a three-year term. Tr. 119:10-14. Schottmiller responded that was fine, and all subsequent wage proposals from both sides reflected the agreement to a three-year term. Tr. 119:15-25; *accord* Tr. 138:1-139:6 (UNAC Staff Representative Penny Brown's testimony).

On the evening of June 12 and morning of June 13, the Union followed its internal ratification process and procedures, and before 10:46 a.m. on June 13, the members had ratified the contract. JXS 54-56. The parties never discussed ratification during bargaining, and there is not a term about ratification in the parties' agreement. *See* JX 56. On the afternoon of June 13, at 12:11 p.m., the Employer sent a new letter to the Union, "revoking and rescinding th[e June 9th] letter." JX 57; JX 62 at Stipulated Fact No. 16. In this letter, Schottmiller—for the first

time—stated that the "accepted proposals were no longer were (sic) on the table" JX 57. At the November 18, 2014 hearing, two witnesses confirmed that before June 10, Chino never communicated to the Union that these proposals had been withdrawn. Tr. 40:20-23 (Lewis's testimony); *accord* Tr. 133:2-5 (Brown's testimony). The letter concluded: "At this point, as Chino Valley Medical Center has notice that a majority of unit employees no longer support UNAC, it would be unlawful for the employer to enter into an agreement with UNAC. Accordingly, based on objective evidence that UNAC no longer represents a majority of employees in the bargaining unit, Chino [] is withdrawing recognition from UNAC." JX 57.

The next day, Lewis emailed Schottmiller a response letter, noting that the June 13 letter was the "first time that the Employer's three outstanding proposals 'no longer were on the table'" and that the Employer "never previously took your proposals off the table." JX 58; JX 62 at Stipulated Fact No. 17. In fact, the Employer sent its May 24 wage proposal to Lewis again on May 29. JXS 49-50. The letter also informed Schottmiller: "Chino RNs have ratified the collective-bargaining agreement that has been in effect since June 10, 2013." JX 58. That same day, UNAC filed the instant charge. GC Exhibit 1(a). At the hearing, Chino failed to introduce the decertification petition upon which it had relied when withdrawing recognition, called no witnesses, and rested after the General Counsel rested its case. Tr. 184:18-20.

III. ARGUMENT

A. General Counsel proved that Chino unlawfully withdrew recognition of UNAC.

Chino cannot prevail because it did not demonstrate even a good-faith doubt defense—let alone satisfy the higher *Levitz* standard. First, good-faith doubt cannot arise during the

certification year. Second, good-faith doubt cannot occur when the Employer's unremedied unfair labor practices have caused the employee dissatisfaction.

1. The certification year's conclusive presumption of majority status applied when Chino unlawfully withdrew recognition.

The certification year here was from June 13, 2012[1] to June 12, 2013. The Union "is entitled to a conclusive presumption of majority status for one year following Board certification as such a representative." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987)). On June 10, the Employer could not withdraw recognition based on objective evidence presented to the Employer on June 9 that a majority of the unit no longer wishes to be represented by UNAC because the certification year's conclusive presumption of majority status still applied.

On June 13, at 12:11 p.m., Chino rescinded and revoked the June 10 letter, but further stated "At this point, as Chino Valley Medical Center has notice that a majority of unit employees no longer support UNAC." Unless a majority of the unit's signatures were gathered during the 12 hour and 10 minute period between 12:01 a.m. and 12:11 p.m., the signatures could not form the basis of objective evidence. An employer has no right "to withdraw recognition from a union on the basis of an anti-union petition circulated and presented to the

[1] In *Dominguez Valley Hospital*, 287 NLRB 149 (1987), the Board ruled that the *Mar-Jac* year began with the first bargaining session, not the date of court enforcement of the bargaining order and not the date in which the parties agreed to schedule a bargaining session. The Board ordered a *Mar-Jac* year remedy for these parties previously. JX 3 at p.2 ("To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd*. 350 F.2d 57 (10th Cir. 1965)."). Because the parties' first bargaining session was held on June 13, 2012, the certification year here began on that date.

employer during the certification year." *See Chelsea Industries*, 331 NLRB No. 184, *1 (2000). The *Chelsea* Board cited to the U.S. Supreme Court decision in *Brooks v. NLRB*, 348 U.S. 96 (1954), approving of "the Board's requirement that, absent unusual circumstances, an employer must recognize the union for the entire certification year, even if it is presented with evidence of the union's loss of majority." *Id*. at *2. The *Chelsea* Board then quoted an earlier Board decision in *United Supermarkets*, 287 NLRB 119, 120 (1987) *enfd*. 862 F.2d 549 (5th Cir. 1989) to support its holding: "'We believe that just as the petition could not raise a question concerning representation nor be acted on by the Respondent within the certification year, the Respondent cannot subsequently rely on it to justify a ... withdrawal of recognition' outside the certification year." 331 NLRB No. 184 at *2.

To the extent that Chino defends that its reliance on signatures presented on June 9, three days before the certification year ended, fits within *de minimus* exception from *LTD Ceramics, Inc.*, 341 NLRB 86 (2004), this argument should be dismissed as the Board did in *Virginia Mason Medical Center*, 350 NLRB 923 (2007), because Chino failed to present evidence that it had authentic signatures [*see* Tr. 184:18-20].[2]

[2] The ALJ correctly ruled that Chino needed produce evidence that it "authenticate[d] all of these [decertification] signatures at the time they received it" [Tr. 183:22-25]. In *Highlands Hosp. Corp. v. NLRB,* the D.C. Circuit enforced the Board's decision that nurses who later expressed that they no longer supported the Union after the employer withdrew recognition was not appropriate *Levitz* evidence because the employer "had no knowledge of that corroborating evidence on the day it withdrew recognition." 508 F.3d 28, 32 (D.C. Cir. 2007). Likewise, if no one from Chino knew that the signing employees were bargaining unit members *at the time* Chino withdrew recognition, the signatures could not be appropriate "objective evidence" of a loss of majority support—the standard for *Levitz* evidence. *Highlands* also supports the contention that a signature on a petition alone does not show objective evidence and the employer has the duty to prove the actual loss by preponderance of the evidence. For example, the employer in *Highlands* knew that one employee who signed the petition actually supported the Union, but the employee wanted another election and misunderstood the petition. *Id.* Because in the employer's letters, it "expressly relied on the petition, and only the petition, to justify its decision to withdraw recognition" and the signature was necessary to establish a loss

Without any exhibits or witnesses, Chino was unable to show it met the Board's limitations to the *de minimus* exception:

> (1) only "some of the signatures were collected during the last hours of the last day of the certification year";
> (2) the questionable signatures were collected in the "last hours" not "last days";
> (3) there was no evidence that the employer "participated in or encouraged the gathering of the signatures on the petition"; and
> (4) the "employer's withdrawing recognition and ceasing bargaining" must not occur "during the certification year."

Id. at 936-37. The Board rationalized the fourth factor's necessity as follows:

> [T]he certification year would no longer be an insulated period for undistracted, uninterrupted bargaining. Rather the first year of bargaining for an initial contract will be susceptible to bargaining clouded by claim and counterclaim respecting union majority support among employees—precisely the type of dispute the Board has explicitly tried to avoid in the initial certification setting. And the first year of bargaining will also be susceptible to interruption by employer withdrawal of recognition and or cessation of bargaining or be undermined by the threat of withdrawal from or cessation of bargaining.

Id. Chino's letter dated June 9 communicated its withdrawal during the certification year, and this is "precisely the type of dispute the Board has explicitly tried to avoid" during the certification year. Accordingly, the Union respectfully submits the ALJ should find Chino unlawfully withdrew recognition during the certification year.

2. UNAC did not unduly delay commencement of negotiations to undermine the certification year bar.

UNAC did not unduly delay bargaining such that an extension of the certification year would be appropriate. Where, as here, an employer tests certification, "the certification year

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of majority support, the employer's knowledge that the employee was mistaken made the petition insufficient. *Id.*

begins on the date of the parties' first bargaining session following final affirmance of the Board's Order unless there is a significant delay in the start of bargaining attributable to inexcusable procrastination or other manifestation of bad faith on the part of the union." *Va. Mason*, 350 NLRB at 923 (internal quotations and citations omitted).

Here, it took the Union three months to prepare for negotiations. The Board has found longer delays were reasonable given the difficulties of beginning bargaining after protracted litigation. In *Virginia Mason*, the D.C. Circuit enforced the Board's decision that a delay of over four months was reasonable. *Id*. at 923; *accord Van Dorn Plastic Mach. Co.*, 300 NLRB 278, 280 (1990) (finding a 3 ½ month delay was reasonable).

The Board has explained that a union does not engage in "inexcusable procrastination" when it is taking time to formulate information requests, process the information, reestablish contacts and prepare for bargaining. *Virginia Mason*, 350 NLRB at 923-24 ("Four months passed from the court's enforcement of the bargaining order to the start of bargaining; but that delay does not strike us as inexcusably long to formulate information requests, to assimilate the information received, to reestablish contacts with unit employees, and to otherwise prepare for bargaining an initial contract."). *Accord Van Dorn Plastic Mach. Co.*, 300 NLRB at 280 ("[T]he 3-1/2-month period utilized is not excessive even assuming, contrary to the evidence, that the Union was responsible for the entire time."). Here, the Union explained due to the high turnover, lack of access to the facility, and outdated employee contact information, it took time to establish contact, formulate information requests, review information responses, recruit, nominate, elect, and train a bargaining team, survey the bargaining unit and analyze their responses. All of this supports any delay getting to the bargaining table—assuming *arguendo* it could be attributed to solely one side—was excusable.

There is no other manifestation of bad faith here. Here, as in *Virginia Mason*, "[t]here was no suggestion that the Respondent complained or protested the passage of time that passed before the first scheduled face-to-face meeting for bargaining." *Id.* at 936. Because Respondent failed to prove that UNAC caused significant delay in the start of bargaining attributable to inexcusable procrastination or other manifestation of bad faith, the certification year began the first bargaining session—June 13, 2012.

3. Chino's unremedied ULPs tainted the union-repudiation signatures purportedly relied upon by Chino.

Chino's numerous unremedied unfair labor practices tainted any signatures on the anti-UNAC petition and therefore the petition could not legitimately be relied upon as the basis for Chino's belief that UNAC did not have continued majority support. "[A]n employer cannot lawfully withdraw recognition from a union if it has committed as yet unremedied unfair labor practices that reasonably tended to contribute to employee disaffection from the union." *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 464 (6th Cir. 1992) (quoting *NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1014-15 (5th Cir. 1990)).

In *Penn Tank Lines, Inc.*, 336 NLRB 1066 (2001), the Board analyzed a case with similar facts to the instant charge in that the Employer had an unremedied unilateral change to waiting-time and lost-time pay and discharged a key union supporter before the dissatisfaction signatures were gathered. The Board analyzed the facts as follows:

> The Board has long held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union. *Olson Bodies*, 206 NLRB 779, 780 (1973). As one court has stated, a "company may not avoid the duty to bargain by a loss of majority status caused by its own unfair labor practices." *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).

The issue then is one of causation. . . . [T]he Board has identified several factors as relevant to determining whether a causal relationship exists. These causation factors include the following: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

With respect to proximity in time and nature of the violation, the record shows that the Respondent's unlawful unilateral reduction in employees' waiting-time and lost-time pay occurred [] less than a month before the withdrawal of recognition. Moreover, the loss in pay occurred on the same day that the Union agreed to allow the Respondent to raise employees' hourly wage by $1 in order to facilitate hiring. The Respondent's unilateral action, then, demonstrated its power to undercut economic gains that were collectively bargained. Where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear. *Cf. Alachua Nursing Center*, 318 NLRB 1020, 1030-1031 (1995).

Further, although the discharge of Miller occurred approximately 5 months before the withdrawal of recognition, in the circumstances of this case, we do not believe that the passage of time would reasonably dissipate the effects of the Respondent's conduct. It is well settled that the discharge of an active union supporter is **exceptionally coercive and not likely to be forgotten**. This unlawful conduct "goes to the very heart of the Act," *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), and **reinforces the employees' fear that they will lose employment if they persist in union activity**. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), *enfd*. 833 F.2d 310 (4th Cir. 1987).

The final two *Master Slack* factors focus on the effect of the unlawful conduct on protected employee activities. The Respondent's discharge of an active union adherent would likely "have a lasting inhibitive effect on a substantial percentage of the work force" and "remain in [employees'] memories for a **long** period." *NLRB v. Jamaica Towing*, 632 F.2d 208, 213 (2d Cir. 1980). In addition, by unilaterally changing the employees' terms and conditions of employment, the Respondent. "minimize[d] the influence of organized bargaining" and "emphasiz[ed] to the employees that there is no necessity for a collective-bargaining agent." *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). In sum, the Respondent's unlawful conduct is of a type that reasonably tends to have a negative effect on union membership and to undermine the employees' confidence in the effectiveness of their selected collective-bargaining representative. In light of this conduct, it is not surprising that an employee petition rejecting the Union would surface.

> For all these reasons, we find that the Respondent's unlawful conduct would reasonably have led to employee disaffection from the Union and would have undercut the Union's support among the employees. Under these circumstances, the Respondent could not lawfully challenge the Union's majority status on the basis of an antiunion petition that arose while those unfair labor practices remained unremedied. Therefore, we conclude that by withdrawing recognition from the Union [ ], and by refusing to bargain with it, the Respondent violated Section 8(a)(5) and (1) of the Act.

Id. at 1067-68 (internal footnotes omitted and emphasis supplied). *Accord Page Litho, Inc.*, 311 NLRB 881 (1993) ("It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees.").

Here, UNAC-supporter Ronald Magsino's employment termination and other egregious and widespread unfair labor practices have never been remedied. As the Board precedent suggests above, the three years passage of time is irrelevant because termination is exceptionally coercive and not likely to be forgotten even after three years. *See United Supermarkets*, 287 NLRB at 120 (petition received **six years** after the employer committed the unremedied unfair labor practices, including termination of union supporters). As in *United Supermarkets*, Magsino's termination occurred in the context of an organizing campaign along with many other egregious and widespread misconduct that has not been remedied. *Id*. Chino's earlier unremedied pre-certification unfair labor practices are also a strong indicator of unlawful bargaining behavior. *See Gadsden Tool, Inc.*, 327 NLRB 164, 164 (1998).

Moreover, other unfair labor practices continue to be committed around recognition and bargaining, including the unilateral change to the break-relief position and the employer's support for circulation of the union dissatisfaction petition. *See C & C Plywood Corp.*, 163 NLRB 1022, 1024 (1967) (explaining an employer's unilateral grant of a benefit not given during bargaining "graphically portrayed to employees that their Employer was in a position to

confer economic benefits that their Union was unable to extract during recent contract negotiations," and this injury to the Union precludes an employer from 15 months later questing continuing majority status and withdrawing recognition when this unfair labor practice remained unremedied). Because the Notice Postings in 31-CA-091701 were not posted before June 28 [JX 9], they clearly had not been posted for the required period when the signatures were gathered on or before June 9, 2012. Thus, at a minimum, the signatures were gathered before this recent bargaining violation had been fully remedied.

4. The parties agreed to a three-year term for the agreement before Chino unlawfully withdrew recognition, and thus the effective date is the lone issue for a remedial bargaining order.

Counsel for the General Counsel called two witnesses who testified that the parties explicitly discussed a three-year term, and that the three-year term was reflected in the compensation proposals. Respondent did not rebut this testimony. Even without such testimony, the Board in *Transit Service Corp.*, 312 NLRB 477 (1993), determined: "[I]t is possible to ***infer*** . . . term of the agreement based on other conduct of the parties, even absent specific discussion of these issues." *Id*. at 483 (emphasis supplied). In that case, the ALJ inferred a three year duration term even though an effective date was absent on the face of the contract, acknowledging that neither the union nor the employer specifically discussed material terms such as "the term of the contract or the effective, commencement, and termination dates of the agreement." According to the ALJ, an agent for the Employer "admitted that Respondent 'may have assumed it was going to be a three year [contract].'" In addition, "the Union also assumed that the contract was going to be for a 3-year term." Thus, since the "parties believed that agreement had been reached on a term of 3 years, and that the parties in practice used the dates

of their various wage offers to determine the duration of the entire contract." *Id*. Here, the parties wage increases reflected a three year agreement. The absence of any rebuttal evidence leads to the ineluctable conclusion that the parties reached an agreement on a three year term.

Any remedial bargaining order, therefore, should be limited solely to the effective date term. *Sheridan Manor Nursing Home, Inc.*, 329 NLRB 476 (1999), presents nearly identical facts as the instant case; and there, the Board explained the limited bargaining order as follows:

> In order to tailor the remedy to the nature of the Respondent's bargaining violation under the particular circumstances of this case, in which the unlawful withdrawal of recognition occurred shortly after tentative agreement on all contractual terms other than an effective date, we shall order the Respondent, on request, to bargain with the Union concerning the remaining unresolved subject, the effective date of the bargaining agreement. This remedy returns the parties to the status quo ante that likely would have existed in the absence of the Respondent's unlawful withdrawal of recognition--a ratified tentative agreement (absent an effective date) accompanied, in all likelihood, by additional postratification bargaining regarding the effective date. Accordingly, if an understanding is reached on the effective date of the tentative agreement ratified on January 12, 1995, following such bargaining, the Respondent shall be required to execute the bargaining agreement.

Id. at 478-79.

Here, Chino failed to introduce evidence that there were other outstanding terms, and Chino's prior misconduct suggests a likelihood that a broader bargaining order would enable Chino to engage in further bad-faith bargaining, particularly regressive bargaining on prior tentative agreements. Accordingly, UNAC respectfully requests that a specific remedial bargaining order limited to the effective date term—as pleaded in the Complaint—be awarded here.

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B. All applicable effective remedies should be ordered here because Chino's repeated and serious NLRA violations.

The Region should seek all available remedies against Chino, as a repeated offender of the NLRA, including award UNAC its bargaining costs, its litigation expenses for the instant proceeding, an extension of the certification year, and a public notice reading.

1. An award of UNAC's bargaining costs is appropriate here because of Chino's egregious and continued violations.

UNAC respectfully submits that the extraordinary remedy of bargaining costs should be awarded here, where Chino's unfair labor practices "have infected the core of a bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies.'" *Unbelievable, Inc.*, 318 NLRB 857, 859 (1995), *enf'd* 118 F.3d 795 (D.C. Cir. 1997), (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969)). That the parties reached tentative agreement on many terms is of no import because unions may receive bargaining costs, including include "reasonable salaries, travel expenses, and per diems," even after an entire contact was reached. *See HTH Corp.*, 361 NLRB No. 65, slip op. at 5 (Oct. 24, 2014); *accord Harowe Servo Controls, Inc.*, 250 NLRB 958, 965 (1980) (explaining reaching agreement on some issues at bargaining does not mean that the employer was engaging in good faith conduct—it may be "no more than the vehicle chosen by the Respondent to conceal a strategy designed to render bargaining futile").

Bargaining costs have been awarded to other unions where the employer goes through the motions of negotiations only to later commit a bad-faith bargaining violation that exposed the earlier proceedings to be a sham. *See Whitesell Corp.*, 357 NLRB No. 97, slip op. at 5 (2011) (awarding bargaining costs where "Respondent's tactics . . . effectively reduced the negotiations

to a sham and wasted the Union's time and resources," and the "tactics" included declaring impasse one day after the previous contract had expired and unilaterally implementing parts of the employer's final offer); *see also Fallbrook Hosp. Corp.*, 360 NLRB No. 73, slip op. at 2 (Apr. 14, 2014) (awarding bargaining costs where "Respondent deliberately acted to prevent any meaningful progress during bargaining sessions"). Here, Chino went through the motions of 25-27 bargaining sessions, refused to schedule additional sessions during June 2013 when the certification year ended, and unlawfully withdrew recognition within two hours of UNAC accepting Chino's remaining outstanding proposals.

Awarding UNAC its bargaining costs is appropriate here because Chino's long and numerous prosecutions by the Board demonstrate that it has engaged in "unusually aggravated misconduct." *See Frankl v. HTH Corp.*, 693 F.3d 1051, 1061 (9th Cir. 2012). In *Frankl*, bargaining costs were awarded where the union lost the first election (which was overturned), but won the second election by one vote; the employer made "unilaterally and arbitrarily" changes during bargaining; and once agreement was reached, the employer withdrew recognition and made unilateral changes to conditions of employment and terminated individuals. Here, UNAC lost the 2008 election (and an ALJ sustained the union's election objections); UNAC won the 2010 election by a 2-1 margin; Chino refused to bargain until it was ordered to do so by the D.C. Circuit; in the meantime, Chino engaged in egregious and widespread misconduct, including unlawful termination of union supporter and perceived ringleader Ronald Magsino, made unlawful unilateral changes during negotiations; and once UNAC accepted Chino's outstanding proposals, it unlawfully withdrew recognition during the certification year. Chino's misconduct is unusually aggravated to support an award of UNAC's bargaining fees.

Awarding UNAC's bargaining costs is warranted where, as here, there is a "direct causal relationship between the respondent's actions in bargaining and the charging party's losses." *See Unbelievable*, 318 NLRB at 859. The record evidence establishes that UNAC spent tremendous resources in March through June 2012 to prepare for negotiations with Chino, and then spent 25-27 sessions negotiating with Chino only to have it all wasted in June 2013 when Chino unlawfully withdrew recognition. Chino's tactics that created delay from 2012 until 2015, causing UNAC to unnecessarily expend resources on bargaining when Chino would ultimately unlawfully withdraw recognition before the final term was negotiated merit an award of bargaining costs. *See Frankl*, 693 F.3d at 1061 (Respondent "is not entitled to benefit financially from the consequences of the delay created by its unlawful bargaining tactics.") (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 100 (1970) ("This delay ... is not because the case is exceedingly complex, but ... because of the skill of the [employer] in taking advantage of every opportunity for delay.")); *Unbelievable*, 318 NLRB at 859 (awarding bargaining costs where a party engages in conduct "calculated to thwart the entire collective-bargaining process").

Awarding bargaining costs' purpose is "to make the charging party whole for the resources that were wasted because of the unlawful conduct" and "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." *Unbelievable*, 318 NLRB at 859. Without the make-whole remedy of bargaining costs award, unscrupulous antiunion employers would be inspired to go through the motions of bargaining to merely withdraw recognition at the very end so long as one term is outstanding to avoid the remedies of refusing to sign an entire contract—paying negotiated wage and benefits increases retroactively and union dues.

2. An award of litigation expenses is appropriate here because of Chino's frivolous defense.

The General Counsel and UNAC should be awarded the extraordinary remedy of their litigation expenses in this proceeding where Chino put on no case in chief, called no witnesses, and failed to enter any admissible exhibits into the record. *See HTH Corp.,* 361 NLRB No. 65, slip op. at 3 (explaining litigation expenses are an extraordinary remedy to be awarded when "a respondent asserts frivolous defenses or otherwise exhibits bad faith in the conduct of litigation or actions leading to the litigation"). While the D.C. Circuit has refused to enforce awards of attorney's fees on the basis that there is nothing in the NLRA's history that shows an intent to override the American Rule that parties pay their own attorneys' fees, *see Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 806 (D.C. Cir. 1997), a recent Board majority reaffirm the Board's interpretation that it has "inherent power" to award litigation expenses under the "bad faith" exception to the American Rule, *HTH Corp*., 361 NLRB No. 65, slip op. at 4 & n.15.

Litigation expenses have been awarded where, as here, the respondent failed to put on any defense because failing to put on any defense has been found by the Board to be a "frivolous defense." *See Teamsters*, 334 NLRB 1190, 1194 (2001) ("[T]he Respondent chose not to put on any defense to the 8(b)(3) allegations. . . . [B]y presenting such a frivolous defense, Respondent made the Board into an instrument of its own unlawful conduct." (quotation omitted)). While failing to call witnesses does not alone make the position "frivolous" for the purpose of receiving litigation expenses, the respondent must have otherwise made "legitimate contentions." *Three Sisters Sportswear Co.*, 312 NLRB 853, 879 (1993). Here, Chino did not otherwise have legitimate contentions through case law, exhibits, or examination of counsel for the general counsel's witnesses, and therefore Chino's failure to call any witnesses further support that its

defense to the instant complaint is frivolous, supporting an award of litigation expenses to UNAC and the General Counsel.

The NLRB has authority to issue litigation expenses to "control and maintain the integrity of its own proceedings." *HTH Corp.*, 361 NLRB No. 65, slip op. at 3-4. Awarding litigation expenses allows other litigants "speedy access to uncrowded Board and court dockets" that allow the goals of the act to be vindicated. *See Tiidee Products, Inc.*, 194 NLRB 1234, 1236 (1972). An "award for litigation expenses—measured by what the General Counsel and the Union have been required to expend—helps restore the parties to where they would have been but for the Respondents' unlawful conduct." *HTH Corp.*, 361 NLRB No. 65, slip op. at 4. If there is no added financial consequence on Chino for putting forth a frivolous defense, but instead it is born by the General Counsel and UNAC, the remedial award would not vindicate the Act's goals or unburden the Board's docket.

3. This case's circumstances warrant an extension of the certification year.

UNAC respectfully submits that the certification year should be extended by six months to allow the parties to negotiate the final term of an effective date without a repeated unlawful withdrawal of recognition. The certification year is extended where "an employer's refusal to bargain with a newly certified union during part or all of the year immediately following certification deprives the union of the opportunity to bargain during the time of the union's greatest strength." *See Santa Barbara News-Press*, 358 NLRB No. 141, slip op. at 3 (2012). Extending the certification year restores the status quo ante because the employer's refusal to bargain takes from the Union "the opportunity to bargain during 'the period when Unions are generally at their greatest strength.'" *Van Dorn*, 300 NLRB at 278 (quoting *Mar-Jac Poultry*

Co., 136 NLRB at 787). In *Van Dorn*, the Board affirmed the ALJ's award of a six-month extension where the employer withdrew recognition two months before the end of the certification year. *Id*. at 280. Restoring the certification year fulfills the original purpose of the certification year itself—to allow time "without outside interference or pressure" to reach an agreement. *See Mar-Jac Poultry Co.*, 136 NLRB at 785.

The Board does not compute the extension based entirely on when in the initial year the unlawful conduct occurred. Instead the extension's focus is to give the union "a reasonable interval in which to resume negotiation and, possibly, reach an agreement, without unduly saddling employees with a bargaining representative they may no longer support." *See Dominguez Valley Hosp.*, 287 NLRB at 151. In *Dominguez Valley Hospital*, the Employer bargained in good faith for 10 months, and the Board ordered a six-month extension. *Id*.; *see also NLRB v. Nat'l Med. Hosp. of Compton*, 907 F.2d 905, 910 (9th Cir. 1990) (upholding a 6-month extension). Where, as here, unfair labor practices are unremedied, an ALJ may require bargaining for an amount of time after the practices have been remedied. *See San Antonio Portland Cement Co*., 277 NLRB 309, 309 (1985) (finding "a 3-1/2-week extension of the certification year would be inadequate for the parties to engage in meaningful bargaining," and thus requiring "the Respondent bargain for a reasonable time, under all the circumstances, after all unfair labor practices have been remedied").

In *First Student, Inc*., 359 NLRB No. 12, slip op. at 1 n.3 & 17 (2012), the Board adopted ALJ McCarrick's extension of the certification year for a full year in a case where "prior to the commencement of bargaining, Respondent had embarked on a pervasive campaign of unfair labor practices" and continued to commit unfair labor practices during the negotiations. Here, too, because Chino embarked on a pervasive campaign of unfair labor practices before

negotiations began (JX 5), and its unfair labor continued during negotiations (JXS 8-9) until it unlawfully withdrew recognition, a six-month extension of the certification year is appropriate.

4. This case's circumstances warrant a public notice reading.

A notice-reading is an effective remedy here, where Chino has continued to engage in numerous and serious unfair labor practices and failed to remedy most of them. *See Charlotte Amphitheater Corp.*, 331 NLRB 1274, 1275 (2000) ("[W]e find that several special remedies are necessary to dissipate as much as possible any lingering effects of the Respondent's 'numerous and serious' unfair labor practices."). Reading the notice publically allows employees to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003).

IV. CONCLUSION

For the foregoing reasons, UNAC respectfully requests that the ALJ find Respondent committed the violations as alleged in the Complaint and order the proper and just relief sought in the Complaint as well as (a) an award of UNAC's bargaining costs; (b) an award of General Counsel's and UNAC's litigation expenses for this proceeding; (c) a six-month extension of the certification year; and (d) a notice reading.

Dated: January 22, 2015

LISA C. DEMIDOVICH, ESQ.
MEGAN L. DEGENEFFE, ESQ.
UNITED NURSES ASSOCIATIONS OF CALIFORNIA/
UNION OF HEALTH CARE PROFESSIONALS

By /s/
LISA C. DEMIDOVICH

Re: Veritas Health Services, Inc. D/B/A Chino Valley Medical Center-and- United Nurses Associations of California/Union of Health Care Professionals; Case No. 31-CA-107321

DECLARATION OF SERVICE

I hereby certify that a copy of C**HARGING PARTY'S POST-HEARING BRIEF** to Administrative Law Judge John J. McCarrick was served on the 22nd day of January, 2015:

SERVED VIA E-FILING
Associate Chief Administrative Law Judge
John J. McCarrick
Division of Judges
National Labor Relations Board
www.nlrb.gov

I also served the above document by electronic mail and certified mail to:

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct and was executed by me on January 22, 2015, in the State of California, County of Los Angeles.

/s/
ROSA RODRIGUEZ